UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES NEW YORK OFFICE

GREEN KNOLL CARE, LLC D/B/A
COMPLETE CARE AT GREEN KNOLL

and

Case 22–CA–244307
22–CA–263661

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Robert E. Mulligan, Jr., Esq. of Newark, New Jersey,
for the General Counsel.
Brandon S. Williams, Esq., of Harrisburg, Pennsylvania,
for the Respondent.
Amelia K. Tuminaro, Esq., of New York, New York,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried remotely in a video hearing on April 27, 2021, pursuant to a complaint issued by Region 22 of the National Labor Relations Board (NLRB) on November 27, 2019. The complaint was reissued on December 31, 2020 after Green Knoll Care, LLC d/b/a Complete Care at Green Knoll (Respondent or Complete Care) allegedly failed to comply with a settlement agreement in case no. 22–CA–244307. The reissued complaint consolidated a new complaint in case no. 22–CA–263661 (GC Exh. 1(k)).[1] The two charges were filed by 1199 SEIU United Healthcare Workers East (Union), alleging unfair labor practices in violation of the National Labor Relations Act (Act).[2]

The consolidated complaint was amended by the counsel for the Acting General Counsel on April 19, 2021 (GC Exh. 1(n)). The Respondent submitted a timely amended answer denying the material allegations in the amended consolidated complaint on April 27 (GC Exh. 1(o)).

On the entire record, including my assessment of the witnesses' credibility[3] and my observations of their demeanor at the hearing and corroborating the same with the adduced

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[1] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief of the General Counsel is identified as "GC Br." and the Respondent as "R. Br." The hearing transcript is referenced as "Tr."

[2] The charge in case no. 22–CA–244307 was filed by the charging party union on July 2, 2019, and the charge in case no. 22–CA–263661 was filed on July 27, 2020 (GC Exh. 1 at (b), (d)).

[3] Witnesses testifying at the hearing included William Massey, David Herbst, Frederica Obeng-Mensah, and Paula Burroughs.

evidence of record, and after considering the brief filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic New Jersey corporation, with an office and place of business located at 875 Route 202/206 North, Bridgewater, New Jersey, is engaged in the operation of a long term care facility providing in-patient medical care. On about February 1, 2019, Respondent purchased the business of Genesis Healthcare, LLC, located at 875 Route 202/206 North, Bridgewater, New Jersey and since then has continued to operate the business of Genesis in basically unchanged form. In the amended answer to the amended consolidated complaint, the Respondent admits it purchased the facility on February 1 but denies that it continues to operate the business of Genesis and that the business operations are "basically unchanged." (GC Exh. 1(o) at par. 3).[4]

Based upon its operations since about February 1, 2019, at which time Respondent admits it commenced operations, Respondent derived gross revenue in excess of $100,000. Based upon its operations since February 1, 2019, Respondent annually purchased and received at its Bridgewater, New Jersey facility goods valued in excess of $5,000 from points outside the State of New Jersey. The Respondent admits in its amended answer that since about February 1, 2019, Respondent has derived gross revenue in excess of $100,000 and received goods at its Bridgewater, New Jersey facility in excess of $5,000 from points outside the State of New Jersey (GC Exh. 1(o)). As such, I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The 1199 SEIU Healthcare Workers East is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The amended consolidated complaint in case 22–CA–244307 alleges that the following[5]:

(1) On about February 1, 2019, the Respondent changed the unit employee premiums for

[4] In the answer to the consolidated complaint, Respondent denied that it recognized the union as the exclusive bargaining representative prior to February 1, 2019 as alleged. The Respondent admits recognition of the union as the exclusive bargaining representative as of February 1, when it took over the operations of Genesis (GC Exh 1 (m)).

[5] The amended consolidated complaint also alleges that 1) On about February 1, 2019, the administrator of Respondent Green Knoll Care engaged in surveillance by taking photographs of employees engaged in union activities near the entrance of the Respondent's Bridgewater facility (GC Exh. 1(k) at pars.12); and, 2) In May 2019, the Respondent changed the amount of advanced notice employees must provide to be eligible to use paid time off when calling out from a scheduled shift (GC Exh. 1(k) at par. 15). The Respondent's understanding is that its conduct on these aspects of the settlement agreement is not in question in this proceeding (R. Br. at fn. 1). I agree. The two allegations were not litigated by the counsel for the Acting General Counsel or by the union and they were not raised as outstanding issues in the posthearing brief.

single medical and dental coverage under the Respondent's health care plan and as a result of Respondent's conduct, the Respondent, between February and September of 2019, has been deducting its changed health care premiums for single medical and dental coverage from the pay of unit employees (GC Exh. 1 (k) at pars. 13, 14).

The complaint alleges that the Respondent engaged in the conduct described in pars. 13, and 14, without prior notice to the union and affording the union an opportunity to bargain over the conduct and the effects of the change. The complaint further alleges that the Respondent failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees over mandatory subjects for the purpose of collective bargaining in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1(k) at pars. 17, 18). The Respondent generally denies that it had engaged in the conduct described in the complaint without prior notice to the union and without affording the union an opportunity over the conduct and effects of the conduct.

In the amended answer, the Respondent denies it has recognized the charging party union as the exclusive collective-bargaining representative since January 14, 2019, and it did not/could not recognize the union until such time as it took over operations on February 1, 2019 (GC Exh. 1(o) at par. 9). The amended answer also denies that the Respondent changed the unit employee premiums for medical and dental coverage and avers that there was a clerical mistake in the payroll department which led to the incorrect withholdings between February and September of 2019.

The amended consolidated complaint in case 22–CA–263661 alleges that the following:

(1) On about July 1, 2020, the Respondent changed the amount of its unit employees' contributions for medical and dental coverage under the Respondent's health care plan by reverting to those contribution amounts specified in the Respondent's January 14, 2019 letter to the union (GC Exh. 1(k) at par. 25).

(2) On about June 7, 2020, the Respondent changed its unit employees COVID bonus program by reducing the amounts and the classifications of the unit employees who could receive the bonuses (GC Exh. 1(k) at par. 26).

(3) On about July 1, 2020, the Respondent eliminated the unit employees' COVID bonus program (GC Exh. 1(k) at par. 27).

The amended consolidated complaint alleges that the Respondent engaged in the conduct described in pars. 25, 26 and 27, without prior notice to the union and without affording the union to bargain over the conduct and effects of this conduct and further alleges that the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1(k) at pars. 28, 29, 30).

In the amended answer to the amended consolidated complaint, the Respondent admits that the amount of unit employees' contributions for medical coverage was reverted to those

contribution amounts as specified in the Respondent's January 14, 2019 letter, but denies that the change was made on July 1, 2020 but, rather, it was an end to the extension of the reduced insurance rates and communicated that information to the union on about June 15, 2020 (GC Exh. 1(o) at par. 25).

In the amended answer, the Respondent also denies that the COVID bonus program changed on June 7, 2020, but rather admits that the program was restructured on June 1 and communicated to the employees that the terms of the bonus program would change on June 7, 2020. The Respondent denies that the COVID bonus program ceased on July 1, 2020, and avers that the program was introduced on June 1 and was only offered to the employees through June 30, 2020, when the temporary bonus program expired (rather than eliminated as alleged) (GC Exh. 1(o) at pars. 26, 27).

III. BACKGROUND

On about February 1, 2019, the Respondent took over the operations and business of a nursing home facility that it had purchased from Genesis Healthcare, LLC located at 875 Route 202-206 North, Bridgewater, New Jersey. The Respondent employed a majority of the previous employees of Genesis. William Massey (Massey) testified, without dispute, that Respondent Complete Care hired at least 90 percent of the predecessor's bargaining unit employees and recognized the union as the exclusive bargaining representative for the employees who were hired from the Genesis bargaining unit (Tr. 23, 24). That unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act consisted of

> All full-time and regular part-time, service and maintenance employees, including certified nursing assistants, activity assistants, dietary aides, restorative aides, cooks and Rehab Techs, employed by the Employer at its 875 Route 202/206 North, Bridgewater, New Jersey 08807 facility, excluding office clerical employees, receptionists, maintenance employees, professional employees, executive, managerial and confidential employees, casual or per diem employees who average less than sixteen (16) hours per week, registered nurses, temporary employees, casual on-call personnel, part-time employees who work a total of one-fifth (1/5th) of the regular full-time work week or less, guards, and supervisors as defined in the National Labor Relations Act, as amended.
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> All full-time and regular part-time, including per diem, licensed practical nurses (LPNs) and unit clerks/medical supply employees employed by the Employer at the Green Knoll Center, 875 Route 202/206 North, Bridgewater, New Jersey facility, as a residual to the existing unit currently represented by 1199 SEIU United Healthcare Workers East.

Prior to the Respondent's purchase of the Genesis facility, the 1199 SEIU United Healthcare Workers East (Union) was the exclusive collective-bargaining representative of the above unit employees and enjoyed successive collective-bargaining agreements through December 31, 2017. In a memorandum of agreement between the union and Genesis, the parties agreed that all terms of the collective-bargaining agreement between the union and Respondent Green Knoll that expired on December 31, 2014, are to be renewed and remain in full force and effect except as modified in the memorandum (GC Exh. 9).

By letter dated January 14, 2019, Louis J. Capozzi, Jr., counsel for the Respondent, informed Milly Silva, then union president, that counsel was representing the Respondent as the new operator in the takeover of operations at the Green Knoll Healthcare facility that was to occur on about February 1 (Jt. Exh. 3). Counsel for the Respondent informed the union of the Respondent's right to establish initial terms and conditions of employment prior to the takeover. Counsel stated that the Respondent intends to recognize the union but will not be assuming the current collective-bargaining contract and hopes to negotiate a new contract.

Relevant to this complaint, the counsel for the Respondent set forth the following initial terms and conditions in the January 14 letter:

- Implement a new employee handbook, and the handbook provisions constitute additional initial terms and conditions of employment.
- Effective immediately, all past practices that arose prior to the new Operator's takeover date of operations shall be eliminated.
- Revise Article 25. The Employer will implement its own health insurance plan. Employees shall be required to pay 20 percent of the premium for individual health insurance coverage, and 50 percent of the premium for dependent coverages.
- Revise Article 5B to allow for 24 hours' notice when a union representative visits the employer's premises.
- Revise Article 12-Paid Time Off and allow the accrual of PTO based on hours worked. PTO shall include vacation, sick, personal days and holidays.
- Existing employees shall begin to accrue PTO on an hourly basis upon the takeover of operations as follows:
    - 0 but less than 1 year of service: 75 hours-10 days.
    - 1 year of service through 3 years of service-112.50 hours-15 days.
    - 4 years of service through 5 years of service-135 hours-18 days.
    - 6 years of service through 10 years of service-150 hours-20 days.
    - 10+ years of service-187.50 hours-25 days.
- Employees may carry over a maximum of 80 hours of PTO with a cap of 80 hours.
- Employees may cash in PTO at any time (minimum 20 hours) at 50 percent.

The letter concluded that since the takeover of operations will be on or after February 1, 2019, counsel was willing to schedule negotiations over a new contract on January 16, 17, 24 and 25.

ALLEGATIONS IN THE AMENDED CONSOLIDATED COMPLAINT

Case 22–CA–244307

1. On about February 1, 2019, the Respondent changed the unit employee premiums for single medical and dental coverage under the Respondent's health care plan

The amended consolidated complaint alleges that on February 1, 2019, the unit employees' premiums for single medical and dental coverage were reverted to those contribution

amounts that were specified in the Respondent's January 14, 2019 letter to the union (GC Exh. 1(k) at pars. 13, 14, 25). The counsel for the Acting General Counsel argues that the reversion of the contribution amounts was a unilateral decision without prior notice and affording the union to bargain over the conduct and the effects of that conduct. It is alleged that as a result of the revision, the Respondent has been deducting the changed health premiums for single medical and dental coverage from the wages of the unit employees from February to September 2019 (GC Exh. 1(k) at par. 14).

The January 14 letter (Jt. Exh. 3) from the Respondent to the union stated that the Respondent will be implementing initial terms and conditions of employment for the union members and relevant to that statement, the Respondent intend to implement its own health insurance plan, to wit:

> Revise Article 25. The Employer will implement its own health insurance plan. Employees shall be required to pay 20 percent of the premium for individual health insurance coverage, and 50 percent of the premium for dependent coverages.

Massey testified that the intended changes were different from the health plan with Genesis. With the predecessor, Genesis participated in the union's benefit fund and under the previous memorandum of agreement, effective through 2017, eligible unit employees had free single coverage and nearly all had free dependent health insurance coverage (Tr. 25; GC Exh. 8).[6]

Massey was the lead negotiator for the union and his team met with the Respondent on 4 occasions in January 2019. The Respondent was represented by attorney Louis J. Capozzi, Jr. (Capozzi). During all four meetings, the parties discussed health care coverage and at the January 25 meeting, the Respondent proposed providing free single coverage for some bargaining unit employees for a period of time and at the expiration of that time period, to have all employees to pay premiums for family coverage (Tr. 28–30). Massey testified that the union counter-proposed to maintain the status quo on the health and dental coverage and to continue bargaining after January 25 to reach an initial bargaining agreement.

The Respondent did not agree to the counter-proposal but informed the union that it was modifying the initial terms to be more consistent with the proposal it made at the January 25 meeting (Tr. 31, 32). Massey requested that Respondent's counsel provide the modifications of the initial terms be sent to him in writing. As requested, by email to Massey, dated January 30, 2019, the Respondent proposed that it is implementing an employer's health insurance plan. The email stated that the Respondent was modifying the initial terms with the following proposed health and dental coverage (Jt. Exh. 4 at p. 1, 2),

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[6] The health coverage for the unit employees under predecessor Genesis stated that "The Employer shall pay the entire premium for medical coverage through the GNYBF (single or dependent coverage), at the current GNYBF contribution level, for all current employees who work 30 or more hours per week. The Employer shall also pay the entire premium (single or dependent coverage) for all current employees who work less than 30 hours per week, but who have been receiving medical coverage (the red-circled part-timers)" (GC Exh. 9 at p. 2).

Free individual coverage from February 1, 2019 through January 31, 2020.
Second year will be at 10 percent.
Third year, at 10 percent.

For the entire term of the collective bargaining agreement, employee and spouse/employee and child will pay 25 percent and family will pay 30 percent.

For dental benefits, individual and dependent coverages shall be paid by the employee based on the percentage they are paying for health insurance under similar individual and dependent coverages.

Massey stated that the parties continued to bargain after the Respondent took over operations on February 1, 2019. Massey recalled eight bargaining sessions after February 1, with two additional sessions in 2020. The parties have not reached an agreement as of the date of this hearing.

During the February bargaining sessions, Massey was informed by the union of some unit employees complaining that they were being charged a premium for single medical and dental coverage by the Respondent. Massey testified that this was inconsistent with the January 30, 2019 email from Capozzi that stated the Respondent will provide free individual coverage through January 31, 2020 (Tr. 36).

The counsel for the Acting General Counsel alleges that the Respondent changed the initial terms of the health insurance and dental care from the January 30 email after Respondent took over the operation on February 1 in violation of Section 8(a)(5) and (1) of the Act. Massey testified that unit employees were no longer receiving free single medical coverage and the dental coverage after the initial terms were modified in the January 30 email from the Respondent. The unit employees were now charged with a premium for the coverage. The parties did not bargain over the changes from the initial terms. Massey testified that he filed a charge with the NLRB on behalf of the union after learning of the changes made by the Respondent following the initial terms set forth in the January 30 email (Tr. 35–37; GC Exh. 1(b)).[7]

In *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972), a successor employer, as in this instance, must bargain with the employee representative when it becomes clear that the successor has hired its full complement of employees and that the union represents a majority of those employees.[8] Employers have a duty to bargain with the union under Section

[7] Massey testified that the union filed a charge with the NLRB on the changes in the health and dental coverage from the initial terms as stated in the January 30 email (Tr. 38). That charge (22–CA–244307) was filed on July 2, 2019 and settled by the parties in an agreement approved by the Regional Director on February 6, 2020 (GC Exh. 1(i)). The Region maintained that the Respondent failed to comply with the terms of the agreement, which resulted in the reissuance of the complaint.

[8] To be certain, although Respondent did not argue at the hearing or in counsel's posthearing brief that it was not a *Burns* successor, I find now that Respondent is a *Burns* successor to Genesis. Predecessor Genesis was in the business of operating nursing care and rehabilitation facility. The Respondent hired a

8(a)(5) about employees' wages, hours, and other terms and conditions of employment. These terms and conditions are "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The Board recognizes that changes to employees' work assignments are mandatory subjects of bargaining. See, e.g., *Pepsi-Cola Bottling of Fayetteville*, 315 NLRB 882, 895 (1994); *Laidlaw Waste Systems*, 307 NLRB 52 (1992) (wage increase is a mandatory subject of bargaining). Health insurance benefits for active employees are a mandatory subject of bargaining. *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157, 159 (1971). Thus, an employer violates its duty to bargain when it makes "a material, substantial, or significant change on a mandatory subject of bargaining without first giving the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

It is also well settled that a statutory successor is not bound by the substantive terms of the predecessors' collective-bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *Burns*, 472 U.S. at 284. In this instance, the Respondent informed the union that it was revising the health insurance plan and coverage in its letter to the union on January 14 (Jt. Exh. 3), to wit:

> Revise Article 25. The Employer will implement its own health insurance plan. Employees shall be required to pay 20 percent of the premium for individual health insurance coverage, and 50 percent of the premium for dependent coverages.

The Respondent is also normally free to revise its initial terms and conditions of employment, which it did in the January 30 email letter to the union (Jt. Exh. 4). The January 30, 2019 email from Capozzi (through the law firm's paralegal, Karen Fisher) stated that from February 1, 2019 through January 31, 2020, individual coverage was free and then in the second year at 10 percent and third year at 10 percent. For the entire collective-bargaining agreement, employee/spouse and employee/child at 25 percent and family at 30 percent.

Upon my questioning of Massey, he testified that it was not the union's position to accept or reject the modified initial terms. He made it clear to the Respondent that the modified initial terms were not what the union was proposing but he understood the Respondent's right to "…spruce up and set initial terms, then that's what they said they were doing, so I didn't respond" (Tr. 37).

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majority of Genesis' employees based upon the undisputed testimony of Massey and has been engaged in the operation of a nursing facility since February 1, 2019. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court clarified the *Burns* doctrine and held that an employer is a *Burns* successor when it purchases the assets of another and 1) there is a substantial continuity of operations after the takeover and 2) if a majority of the new employer's work force in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a substantial and representative complement.

I agree with the counsel for the Acting General Counsel that the modified initial terms were established as the status quo by the Respondent as stated in the January 30 email to the union (GC Br. at 18, 19). The email announcement stated that for health insurance, the Respondent will implement an employer's insurance plan that provided free individual coverage from February , 1, 2019 through January 31, 2020; 10 percent in the second year; and 10 percent in the third year (Jt. Exh. 4). After establishing initial terms and conditions of employment and during contract negotiations, an employer is now obligated to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). "Once a *Burns* successor has set initial terms and conditions of employment, however, a bargaining obligation attaches with respect to any subsequent changes to terms and conditions of employment," as required by *Katz,* above; *Tramont Manufacturing, LLC*, 369 NLRB No. 136 (2020) (clarifying the standard applicable to unilateral actions taken by a *Burns* successor).

In the Respondent's answer to the consolidated complaint, the Respondent denied that it made any changes to the health care plan between February and September 2019. The counsel for the Respondent stated that the employer made no changes in the health and dental premiums from the January 30 email from Capozzi to Massey (Jt. Exh. 4). The Respondent asserts that it was a clerical mistake in the payroll department that resulted in the incorrect withholdings for the health care and dental premiums, which was corrected pursuant to the settlement agreement in case no. 22–CA–24407 (below)(GC Exh.1(m)).

I find regardless as to whether the end result was intentional or a clerical mistake, there was in fact a material and substantial change on a mandatory subject of bargaining when the free individual healthcare coverage was changed. *Katz*, above. It is not clear when the Respondent realized the clerical mistake and perhaps, not until the union filed its charge on this issue. In any event, the Respondent had ample opportunities to correct the clerical mistake by making whole the unit employees when their health and dental premiums were deducted from February to September 2019. The failure to correct the clerical mistake is a violation of Section 8(a)(5) and (1) because the Respondent intentionally retained the material change after realizing that it was unlawful.

Accordingly, I find and recommend that the Respondent violated Section 8(a)(5) and (1) of the Act when on about February 1, 2019 through September 2019, the unit employees' premiums for single medical and dental coverage were reverted to those contribution amounts that were specified in the Respondent's January 14, 2019 letter to the union.

Case 22–CA–263661

1. On about July 1, 2020, the Respondent changed the amount of its unit employees' contributions for medical and dental coverage under the Respondent's health care plan by reverting to those contribution amounts specified in the Respondent's January 14, 2019 letter to the union

The parties entered into a settlement agreement approved by the Regional Director on February 6, 2020, in case no. 22–CA–24407 and the complaint was closed on May 7, 2020. The agreement stated that the Respondent will pay the unit employees for the wages and other benefits that was lost, with interest, when the Respondent unilaterally deducted contributions from the employees' pay for individual health and dental coverage without bargaining with the union (GC Exh.1(i)(j). Based upon the settlement (resolving case no. 22–CA–244307), the free single health care coverage was restored.

However, the counsel for the Acting General Counsel argues that the affirmative obligation of the Respondent under the settlement to refrain from unilaterally changing the terms and conditions of employment was not followed when the Respondent unilaterally increase health and dental insurance premiums on July 1, 2020 (GC Br. at 24, 25). As such, since the Regional Director believed that there was a breach in the settlement agreement and re-issued this amended consolidated complaint, a finding as to this issue is necessary. I agree that there was a breach in the settlement agreement and that the Respondent did not refrain from making unilateral changes in the health insurance benefits without bargaining with the union to an overall impasse. The agreement, signed by Joseph Weingarten, director of operations, and approved by the Regional Director on February 6, 2020, restored the free individual health coverage, 25 percent for employee plus one, and 30 percent for family coverage (GC Exh. 1(i)). This was the status quo for the health insurance coverage going forward.

Massey testified that there were two bargaining sessions in 2020. The parties continued to discuss the health insurance premiums in their sessions. At the February 10, 2020 bargaining session, Louis Capozzi stated that it was the intention of the Respondent to extend the free single health coverage through February and for the month of March 2020. The union was also informed that on April 1, 2020, the unit employees will begin to pay some of the premiums. Massey understood this to be a "token amount" (Tr. 39, 40). Massey testified there was no agreement on February 10 as to when the free single healthcare coverage would change. Massey made notes of the February 10 bargaining session. He noted that Respondent was committed to extend the free single health coverage for another 60 days through March. Massey also noted that Capozzi stated employees will begin to pay a token amount on April 1 whether there is an agreement or not. Massey, on behalf of the union, counter-proposed dollar amounts that unit employees would pay for single, dependent, and family health coverage. Massey testified that the union was willing for unit employees and new hires to pay $25 for single coverage, $50 for children/spousal coverage and $75 for full family coverage. The Respondent was willing to consider the counter-proposal but not at the February 10 session (Tr. 40–43; GC Exh. 3).

The parties met on March 5, 2020, and Massey again made notes of the bargaining session. Massey testified that much of the session centered over the discharge of an employee but towards the end of the meeting, attorney Capozzi informed Massey that the Respondent was not willing to accept the proposal made by the union at the February 10 session regarding the dollar amounts for premiums proposed by Massey. With respect to health care coverage, the Respondent counter-proposed that unit employees will receive free single health coverage for 12 months and an extension for another 2 months. Massey was again informed that the Respondent expected the employees to pay something in health care premiums towards the end of March. There was no mention in the Respondent's proposal regarding dependent and family coverage or

for dental coverage (Tr. 43–47; GC Exh. 4).

The parties were scheduled to meet again on March 23, but due to the COVID-19 pandemic, the meeting was cancelled. Prior to March 17, the parties were informed by the mediator that their March 23 meeting was cancelled due to the pandemic. Massey testified that he exchanged emails with Capozzi on March 17 after learning of the cancellation. Capozzi emailed Massey on March 17 as to how the union would like to proceed. Massey informed Capozzi on the same day that if there are any new or modified proposals from the Respondent, the parties could discuss them by email or over the phone. The parties have not met in-person since March 5 but did continued to bargain by exchange of emails. Massey also related to Capozzi that the union expects the Respondent to maintain the status quo (of free health insurance premiums) (Tr. 47–50; GC Exh. 5). Massey testified that the Respondent continued the free healthcare coverage after March and through April 2020. Massey stated that the union was not notified of the extension (Tr. 49, 50).

On May 1, Capozzi wrote to Massey by email that the Respondent would continue to provide free health insurance through May 31 (Jt. Exh. 5). The email stated,

> Bill [Massey]: wanted to let you know that we're continuing the free health insurance for an additional month, or through May 31, 2020, in light of the COVID pandemic. If you have any questions, please do not hesitate to contact me. Stay safe.

Massey testified that the parties did not bargain over the extension of free health insurance through May 31 and the union was not notified that the free insurance was extended beyond June 1 (Tr. 50–52). By email on June 15, attorney Brandon Williams, representing the Respondent, informed Massey that the Respondent would no longer pay the full health insurance premiums and it will revert to the contribution schedules noted in the January 14, 2019 initial terms (Jt. Exh. 8),

> Lou [Capozzi] is out of town, but asked me to notify you that effective July 1, 2020, Green Knoll will no longer be paying the full health insurance premiums for employees, and will revert to the contribution schedules found in the initial terms and conditions of January 14, 2019 at paragraph 4. "Employees shall be required to pay 20 percent of the premium for individual health insurance coverage, and 50 percent of the premium dependent coverage."[9]

Massey responded to the June 15 letter on the following day. Massey stated that the union did not agree to reverting the free health care insurance to the January 14 proposal. Massey countered by proposing that the Respondent continue with free health insurance premium contributions for the remainder of 2020, similar to when Respondent foregoes health insurance premiums for employees at another nursing facility after assuming operations (Jt. Exh.

[9] As noted above, the January 14 letter (Jt. Exh. 3) stated that the Respondent will be revising Article 25 of the Respondent and union agreement, "The Employer will implement its own health insurance plan. Employees shall be required to pay 20 percent of the premium for individual health insurance coverage, and 50 percent of the premium for dependent coverages."

8). Massey testified he received no response to his June 15 email letter (Tr. 53).

According to Massey, the employer implemented changes in the health premiums after July 1 but were not changed as proposed and reflected in Williams' June 15 email. The June 15 email proposed implementing the initial terms and conditions from the January 14, 2019 email which required employees to pay 20 percent premium. Massey testified that the Respondent began to charge 10 percent premium starting on July 1, 2020 (Tr. 53, 54).

The Respondent maintains that it implemented the health coverage proposal that was consistent with the initial terms and conditions in the January 14, 2019 email letter. The Respondent stated that it had delayed the implementation as a courtesy to the unit employees until July 1, 2020 (Jt. Exh. 2 at 2).[10]

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, above; *Toledo Blade Co*., 343 NLRB 385 (2004). Section 8(a)(5) and 8(d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Katz*, above at 742–743. A subject is considered a "mandatory" subject of bargaining when it is among the subjects described in Sec. 8(d) of the Act, which defines the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Thus, an employer may not change the terms and conditions of employment of represented employees, including salary increases or decreases, without providing their representative with prior notice and an opportunity to bargain over such changes. *Northwest Graphics, Inc.*, 342 NLRB 1288 (2004). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Flambeau Airmold Corp*., 334 NLRB 165 (2001), quoting *Alamo Cement Co*., 281 NLRB 737, 738 (1986).

As noted above, it is clear that the Respondent is free to set initial terms and conditions of employment as a *Burns* successor, which the employer did so on January 14, 2019. However, as also noted above, once a *Burns* successor has set initial terms and conditions of employment, however, a bargaining obligation attaches with respect to any subsequent changes to terms and conditions of employment. *Tramont Manufacturing, LLC*, above. This occurred when the Respondent decided to provide free full insurance premiums. The Respondent stated that it continued to provide free full insurance premiums to the unit employees after setting the initial terms on January 14 as a courtesy to the unit employees and the effects of the COVID pandemic had on the nursing facility staff. This was reaffirmed in the May 1, 2020 email to Massey stating that the free insurance benefits will continue through May 31 (Jt. Exh. 5). The union continued

[10] The counsel for the Acting General Counsel subpoenaed the Respondent payroll records during the July 2020 to April 2021 timeframe. David Herbst (Herbst) testified as the custodian of the records that were subpoenaed. Herbst was and is the director of payroll for Respondent Complete Care and oversees all nursing facilities owned by Complete Care (Tr. 79). In reviewing the payroll records, Herbst explained that the letters "EE" represented single-only health plan and deductions were made on a biweekly basis for single coverage at $21.76 starting on July 10, 2020 and continuing through April 16, 2021 (Tr. 77–79; GC Exh. 10 at pp. 1–18).

to negotiate over the type and amount of the health insurance and dental benefits and did not expressly objected to the Respondent's implementation of providing free full insurance premiums through May 31. The free health care benefits ended on July 1, when the union was informed on June 15 that it will be implementing the January 14 initial terms and conditions on the health insurance issue.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it substantially modified the initial terms and conditions of the health care premium cost to the unit employees. The change occurred after the modified initial terms were set on January 30, 2019. Instead of implementing the employer's own health insurance plan and to charge employees 10 percent of premium for individual health coverage (under the modified terms) and 50 percent for dependent coverages (under the January 14 initial terms) (Jt. Exhs. 3, 4), the Respondent continued to provide free and full insurance premiums. The free insurance premiums were in effect through July 1, 2020.

The Respondent argues that the continuous extensions of free insurance were not objected by the union during their bargaining sessions and was provided to assist the nursing staff during the COVID pandemic. It is maintained that once the urgency of the COVID pandemic had passed, the Respondent foregoes the free health premiums (R. Br. at 6–8). Contrary to the Respondent's argument on this point, I agree with the counsel for the Acting General Counsel that the Respondent was obligated to refrain from making any unilateral changes in healthcare benefits subsequent to setting the modified initial terms on January 30 (GC Br. at 26, 27). Regardless of whether the continuation of free individual premiums for March, April, May, and June were temporary extensions (as argued by the Respondent), they were unilateral material changes that the Respondent was obligated to notify the union and bargain over the changes. The Respondent was obligated to notify and offer to bargain with the union over the free premiums in healthcare which had changed the January 30 modified terms. Contrary to the Respondent's assertions that the union accepted each extension of the free healthcare insurance (R. Br. at 7), I find that Massey credibly testified that the union was never afforded notice and an opportunity to bargain over the extensions (Tr. 51). This was true for each extension in April, May, and June. Massey testified that the union was not even notified that the April extension for free healthcare was continuing through May (Tr. 50). And, while I fully appreciate and recognize the Respondent's efforts to continue providing free health premiums during the COVID pandemic, a violation of Section 8(a)(5) does not require a finding of bad faith when the healthcare premiums were unilaterally changed by the Respondent. *Katz,* above, at 743 and 747.

The second unilateral change occurred when Massey received a June 15, 2020 email from Respondent's counsel, Williams, stating that the Respondent intends to implement, effective July 1, 2020, the initial terms and conditions of the January 14, 2019 email requiring the unit employees to pay 20 percent of the premium for individual health insurance coverage and 50 percent of the premium for dependent coverage (Jt. Exh. 8).

Massey also objected to reverting the free health insurance premium to the January 14 initial terms and counter-proposed for the Respondent to continue with free health insurance premium for the remainder of 2020, similar to another nursing facility where the Respondent

foregoes health insurance premiums of employees after taking over operations. As testified by Massey, the Respondent implemented the premium deduction at 10 percent consistent with the January 31 modified initial terms and not the 20 percent in the January 14 initial terms (Tr. 53, 54; Jt. Exh. 3). As such, the Respondent did not follow its own June 15 email to the union by reverting to the January 14 initial terms, but rather, the Respondent charged unit employees a premium deduction of 10 percent from wages.

By substantially modifying the initial terms and conditions of the health insurance benefits and not affording notice and an opportunity to bargain over the changes, the Respondent violated Section 8(a)(5) and (1) of the Act.[11]

2. On about June 7, 2020, the Respondent changed its unit employees COVID bonus program by reducing the amounts and the job classifications of the unit employees who could receive the bonuses

The Respondent stated it had instituted two COVID related bonus programs at the Respondent's Green Knoll facility. The first bonus program was a "gift reward" program with an undated announcement, but to be effective from March 27 through April 30, 2020 (Jt. Exh. 2 at p. 10; R. Exh. 1) and states the following bonuses for different job categories:

> All Hourly Employees, Full Time, Part Time and Per Diem, who work 4 or more shifts in a week will receive a reward payment equal to:
>
> - RN's-$150/week
> - LPN's-$125/week
> - CAN's-$100/week
> - All other nursing-$100/week
> - Recreation-$100/week
> - Culinary-$50/week
> - Environmental Services-$50/week
> - Reception-$50/week

It is not alleged in the complaint that the union objected to the unilateral implementation of the program on March 27. The March 27 program expired or ended on April 30.[12]

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[11] Although not raised at the hearing, the counsel for the Acting General Counsel argues in his posthearing brief that the Respondent had no intent to engage in meaningful bargaining over the healthcare benefits and, therefore, it was a fait accompli (GC Br. at 20, 21). A fait accompli situation arises when there is a fixed intent to make the change by a respondent that obviates the possibility of meaningful bargaining. *Aggregate Industries,* 359 NLRB 1419 (2013). It is not necessary to address this alternative argument because the finding of facts show that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the healthcare benefits.

[12] David Herbst again provided testimony as background information. He stated that the payroll records reflect that employees received bonuses complied over a weekly payroll, usually Sunday through Saturday. Herbst also believed that at one point, the bonuses were recorded in payroll on a daily basis (Tr. 69–73; GC Exh. 10 at pp. 21–170). Herbst believed that the bonus amounts were entered by a human resources representative at the direction of the facility administrator (Tr. 74, 75).

Paula Burroughs (Burroughs) is and was the facility's nursing home administrator in the spring of 2020. Burroughs described the unprecedented frenzy caused by the COVID-19 pandemic on the residents and staff at the nursing home. She testified that there was a substantial "uptick" in residents catching the virus and a corresponding fear by the staff in working at the nursing facility. Burroughs believed there was about a daily callout of 50 employees during March and April 2020 (Tr. 104–108). Burroughs testified that she made the recommendation for the bonuses in consultation with Joseph Weingarten, the director of operations at the nursing facility, to encourage employees to return to work during the pandemic. She testified that the bonus program was approved by the Respondent's owner. Burroughs did not know who drafted the flyer. The bonus program started on March 27 through April 30, 2020. Burroughs believed that the flyer about the bonus program was handed out with the paychecks to all employees (Tr. 108–113, 117, 118).

Burroughs was stricken with the COVID-19 virus from April 11 to May 11, 2020 (Tr. 115). Burroughs recalled that she directed Nona Moody, the business manager, to put the notices in the paycheck envelope (Tr. 117, 118).

The Respondent further stated that a second bonus program was announced on about May 2, 2020. On May 2, the Respondent instituted a new bonus structure program that provided $100–$150 bonuses to non-exempt staff and unit employees for working a full shift or on units where assistance is needed and a $250 bonus to all exempt employees every day for the entire pay week (Jt. Exh. 9). The program also included a "Dedication Reward Program," that provided the following monetary amounts to various unit and non-unit employees:

$150/Week RN's and LPN's
$100/Week CNA's
$100/Week All other nursing
$50/Week Culinary
$50/Week Environmental Services
$50/Week Reception, Central Supply, Medical Records
$50/Week Recreation

There was no indication when the May 2 bonus program would end. However, the bottom of the flyer stated, "Subject to change at administration discretion."

Frederica Obeng-Mensah (Obeng-Mensah), who is and was an LPN at the Respondent's Complete Care facility, testified that she was working at the facility in March through July 2020 and that she became informed of the bonus program in a flyer that was posted by the time clock. She became aware of the program in May 2020. She did not recall when she saw the flyer but thought it was between May 17–30 (Tr. 90–92; R. Exh. 2). The flyer referenced by Obeng-Mensah stated the following:

COVID-19 Employee Recognition Program

We want to recognize your commitment to the facility and the

residents and
reward you for helping us and the residents through these challenging times.

Attendance Bonuses: All Hourly Employees, Full Time) Part Time and Per Diem,
who work 4 or more shifts in a week will receive a reward payment equal to:

- All Nurses $75/Week
- All other Employees $50/Week

Hazard Pay: Hazard pay for DEDICATED Covid-19 Units:

- Nurses $75 /Shift
- Aides, HK & Activities $50 /Shift

Extra Shift Pick-Up Bonus on Covid-19 Unit:

- Nurse $75 /Shift
- Aides $ 50/ Shift

All staff will be screened in adherence to CDC guidelines at the beginning of their shift.

COVID-19 Employee Recognition Program: **5/17/2020 through 5/30/2020**
Bonus pay will be paid out weekly.

Counsel for the Acting General Counsel objected to the introduction of R. Exh. 2 because the witness could not authenticate the document as to when and how she received the flyer. I allow the document into the record (Tr. 96, 97). Upon my review of both documents, I would reasonably find that the May 1 flyer (Jt. Exh. 9) was the initial first bonus program that ended on May 17 when the second bonus program was implemented (R. Exh. 2) with changes in the bonuses to unit employees. For instance, all nurses were to receive $150 per week in the May 1 flyer (Jt. Exh. 9) but in the second flyer, nurses would receive $75 per week and only additional wages as bonuses for hazard pay or for working additional shifts on COVID units, which was not stated in the former bonus flyer (R. Exh. 2). Additionally, all "other nurses" except for RNs in the May 1 flyer were to receive $150 per week whereas in the second flyer, "other nurses" were to receive $50. Obeng-Mensah testified that she could not recall the type or amount of her bonuses she received in May (Tr. 101). The flyer stated that the second bonus program would end on May 30.

On June 1, 2020, the Respondent announced that the bonus program would be "winding down" after June 6, but that employees committed to working in COVID+ or PUI (Pick Up) units will continue to receive hazard pay. The announcement was signed by Joseph Weingarten, director of operations (Jt. Exh. 7) and stated, in part,

> Employees that are committed and work either "covid+", or "PUI" units will still receive hazard pay (Nurse: $50/shift, Aides & HK $35/shift) Expiration 6/30/2020.

William Massey (Massey) testified that he became aware of the May bonus programs from the union's vice-president, who forwarded the flyer to him. Massey stated that there were no discussions about COVID related bonuses prior May 2 (Tr. 54, 55). In an email dated May 28, William Massey, counsel for the union, informed Louis Capozzi, counsel for the Respondent, that he had been informed of the bonus program that was unilaterally implemented by the Respondent on May 2 without notice to the union. Massey stated that the union did not seek rescission of the program but that the unilateral action undermined the union's role as the bargaining representative. Massey reminded Capozzi that the "…Union is entitled to notice and an opportunity to bargain before any future modifications are made (to those bonuses, or any other term and condition of employment)." Massey said that Capozzi did not respond to his email (Jt. Exh. 6; Tr. 55, 56, 60).

The amended consolidated complaint alleges that on about June 7, the Respondent modified the COVID bonuses to unit employees by reducing the amounts and the job classifications of the unit employees who could receive the bonuses without prior notice to the union and affording the union an opportunity to bargain over the conduct and effects of the conduct in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1(k) at par. 26, 28, 29, 30). The Respondent maintains that the union did not seek recission of the bonus program but only to be consulted if there were subsequent modifications.[13] The Respondent states that there were no modifications of the bonus program when it ended (Jt. Exh. 2 at 2).

Employers have a duty to bargain with the union under Section 8(a)(5) of the Act about employees' wages, hours, and other terms and conditions of employment. These terms and conditions are "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The Board recognizes that changes to employees' work assignments are mandatory subjects of bargaining. See, e.g., *Pepsi-Cola Bottling of Fayetteville*, 315 NLRB 882, 895 (1994) (employee start time a mandatory subject of bargaining); *Treanor Moving and Storage Co.*, 311 NLRB 371, 386 (1993) (employee hourly schedule is mandatory subject of bargaining); *Laidlaw Waste Systems*, above. Bonuses, like wages (increases or decreases) are a mandatory subject of bargaining. *Purple Communications*, 370 NLRB No. 26 (2020). Thus, an employer violates its duty to bargain when it makes "a material, substantial, or significant change on a mandatory subject of bargaining without first giving the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

Obviously, daily bonuses given to unit employees is a material and substantial change to wages, a mandatory subject of bargaining. Even, if the bonuses were considered as gifts by the

[13] If the Respondent believed that Massey had acquiesced and therefore waived the union's statutory bargaining rights over the implementation of the bonus programs, I find that there was no effective waiver. The union, through Massey, accepted the bonus program but he also stated to Capozzi that he should be notified and consulted of any modifications to the May bonus programs. There was no clear and unmistakable waiver of the union's statutory bargaining rights. *Metropolitan Edison Co. v. NLRB* 460 U.S. 693 (1983); *American Diamond Tool, Inc.,* 306 NLRB 570 (1992).

Respondent to show its appreciation of the staff during the COVID pandemic, they are nevertheless terms and conditions of employment and a mandatory subject for bargaining. It is well established that an employer and the representative of its employees have a mandatory duty to bargain with each other in good faith about wages, hours, and other terms and conditions of employment. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). The Board has held, however, that employers do not have to bargain about gifts that they give to their employees. Id. As the Board has explained, items "given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors" are properly characterized as gifts. *Benchmark Industries*, 270 NLRB 22, 22 (1984). Conversely, items that are "so tied to the remuneration which employees receive for their work that [the items] are in fact a part of the remuneration" are properly characterized as wages and are subject to the mandatory duty to bargain. *North American Pipe Corp.*, 347 NLRB at 837.

Applying the Board's guidance, I find that the bonuses at issue here was not a gift, and instead was a form of compensation that is subject to the duty to bargain. Respondent awarded the bonus because its employees were willingly to work in hazardous health condition and the bonuses were based upon certain job classifications that engaged in potentially hazardous and health threatening conditions. In addition, Respondent promised additional bonuses if employees work in COVID units. There was a clear nexus between employees' work responsibilities and the bonuses that employees received, such that Respondent had a mandatory duty to bargain with the union.

I find that the Respondent violated the Act when it failed and refused to notify the union about, and provide an opportunity to bargain, over the modifications of the bonus programs when it was modified on about June 7. Although the union and the complaint does not allege that the bonus program implemented on March 27, 2020 was unlawful, the union, through Massey, raised with the Respondent's counsel the need for the Respondent to notify the union and bargain over future modifications of the bonus program.

A second bonus program was implemented by the Respondent on May 2. The union counsel only became aware of the May bonus program when it was already implemented. Subsequent to the May 2 bonus program, there were modifications to the program starting on May 17 through May 30. On this point, I find the testimony of Obeng-Mensah to be credible.[14] The modifications of the bonus program on May 17 reduced the nurses' bonuses from $150 to $75 per week with a specified requirement to work 4 or more shifts per week. Nurses working in COVID units (hazard pay) would receive $75 per shift. Aides and housekeepers would receive a reduced bonus of $50 per shift, whereas the initial May 2 bonus program had provided bonuses ranging from $100-$150 for all unit employees.

Massey's email to Capozzi reminded him that the union was entitled to notification and

[14] Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003).

opportunity to bargain over any modifications was made on May 28. While Massey had not request recission of the bonus programs, Massey did request notice and an opportunity to bargain over any modifications. Massey testified he did not receive a response from the Respondent on his email.

Subsequent to May 28, the Respondent, on June 1, continued the bonus program but with additional modifications, which should have triggered the notice to the union of the changes and an opportunity to begin statutory bargaining. Contrary to the Respondent' argument, I find that the June 1 announcement substantially made modifications to the bonus program requiring notice to the union and an opportunity to bargain over the changes. As noted above, the COVID bonuses ended for most employees, effective June 6, which was a substantial impact to the unit employees and a material change to their wages. For other employees committed to work in the COVID units, the bonuses would continue until June 30 (Jt. Exh. 7), but with modification of the dollar amounts of their bonuses. The bonus program that was implemented between May 17 to May 30 (R. Exh. 2), provided hazard bonuses to nurses, aides, and HK (housekeepers) of $75 and $50, respectively. The June 1 announcement reduced the hazard bonuses to $50 for nurses and $35 for aides and HK staff (Jt. Exh. 7). Massey testified that he never heard back from Capozzi after his May 28 email that had demanded to bargain over any modifications of the two May bonus programs or about the June 1 bonus program (Tr. 56). By failing and refusing to engage in bargaining over the modified bonus program and the effects of those modifications, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. On about July 1, 2020, the Respondent eliminated the unit employees' COVID bonus program

It is not disputed that the bonus program ended on June 30, 2020.[15] The record shows that on June 1, the Respondent stated to all staff that the most COVID-19 bonus programs will be winding down after June 6. This announcement to all staff was signed by Joseph Weingarten, the facility's director of operations. (Jt. Exh. 7). The June 7 announcement stated that hazard pay for employees on COVID shifts would continue and the amount of the bonus per shift would be $50 for nurses and $35 for aides and housekeepers, which was a further reduction from the May 1 bonus structure program and from the bonus structure of May 17 as testified by Obeng-Mensah.

Obeng-Mensah further testified that she subsequently became aware that the bonus program had ended but was not certain when that occurred. She vaguely recalled seeing the following letter by the time clock (Tr. 98–101; Jt. Exh. 7):

Memo:
To: All our amazing staff:
From: Complete Care

6/1/2020

[15] The payroll records subpoenaed by the counsel for the General Counsel shows that there were no COVID bonuses given after June 30, 2020 (GC Exh. 10 at pp. 21-170).

The entire Complete Care family would like to remind you of our sincere appreciation for all your dedication throughout the recent crisis and its aftermath. Complete Care recognized your selfless devotion to our beloved residents and established reward programs to our unbelievable staff to cushion the blow.

At this juncture, after building wide testing, we have a much better understanding of the external and internal risks and we are assessing that we are all ready to move on to the next phase as per CDC/DOH guidelines.

With that said, Compete Care will be winding down most Covid-19 related pay bonus programs this weekend, after Saturday 6/6/2020 due to cost constraints that cannot be accommodated any longer.

Employees that are committed and work either "covid+", or "PUI" units will still receive hazard pay (Nurse: $.50/shift, Aides & HK $35/shift) Expiration 6/30/2020.

As we predicted at the onset, we will emerge stronger and with Gods help we and all our families and communities will bounce back to our pre-covid lives stronger than ever!!!

With much recognition & appreciation

Joseph Weingarten
Director of Operations

The amended consolidated complaint alleges that the Respondent ended the unit employees' COVID bonus program without prior notice to the union and without affording the union to bargain over the conduct and effects of this conduct as the exclusive collective-bargaining representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act (GC Exh. 1(k) at pars. 28, 29, 30). As noted above, the Respondent argues that there were two bonus programs, each running for a certain period of time and that the May 2 program clearly stated that the program "…was subject to change at the administrations discretion" (Jt. Exh. 2 (D)).

Contrary, as I have found above, the Respondent actually implemented three bonus programs. The first one was implemented on about March 27 and was to end on April 30, 2020. The union was not notified of this program and not provided an opportunity to bargain over this program. A violation of the Act was not alleged in the amended consolidated complaint. The second bonus program started on about May 2, with modifications on May 17. At the discretion of the Respondent, this program ended on May 30. The union was not notified of the implementation and modifications of this program. Massey credibly testified that he requested notification from the Respondent and an opportunity to bargain on May 28. A third bonus program started on June 1 that eliminated most bonuses except for unit employees working in COVID and PUI units. Prior to this material change in the bonus program, the Respondent should have noticed the union and offer to bargain over the modifications. I find that in failing

to notify the union of the bonus programs and offering to bargain over the initial May 2 bonus program and its modifications made on May 17 and June 1, the Respondent violated Section 8(a)(5) and (1) of the Act.

In addition, as part of the bargaining over the bonus modifications of June 1 announcement, the Respondent would have been required to also bargain over the effects of the decision to eliminate the bonuses because the June 1 announcement stated that the bonus program would be "winding down" as of June 6 (except for the hazard bonuses). Assuming, the Respondent was not obligated to bargain over the implementation of the bonus programs, it is well established that an employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if the employer has no obligation to bargain about the decision itself. *Tramont Manufacturing, LLC*, 369 NLRB No. 136, slip op. at 5 (2020); *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981)). The Board requires pre-implementation notice because there may be alternatives that the employer and union can explore to avoid or reduce the impact of the decision without calling into question the decision itself. *Good Samaritan Hospital*, 335 NLRB 901, 903–904 (2001); *Allison Corp.*, 330 NLRB at 1366. Once the employer has furnished a meaningful opportunity to bargain, it is incumbent on the union to pursue its bargaining rights. *Berklee College of Music*, 362 NLRB 1517, 1518 (2015).

In this instance, the Respondent had a month after the June 1 modifications to the program to provide notice to the union and an opportunity to bargain before the entire program ended on June 30. The union had a valid interest in effects bargaining to explore options for reducing or avoiding the impact when the bonuses were eliminated. Through good-faith negotiations between the parties, the parties could have reached alternatives to the decision to end the program and reduce the impact of less wages for unit employees.

By failing and refusing to engage in bargaining over the elimination of the bonus program and the effects in ending the program, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Green Knoll Care, LLC d/b/a Complete Care at Green Knoll, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, 1199 SEIU United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees, in the following appropriate unit:

> All full-time and regular part-time, service and maintenance employees, including certified nursing assistants, activity assistants, dietary aides, restorative aides, cooks and Rehab Techs, employed by the Employer at its 875 Route 202/206 North, Bridgewater, New Jersey 08807 facility, excluding office clerical employees, receptionists,

maintenance employees, professional employees, executive, managerial and confidential employees, casual or per diem employees who average less than sixteen (16) hours per week, registered nurses, temporary employees, casual on-call personnel, part-time employees who work a total of one-fifth (1/5th) of the regular full-time work week or less, guards, and supervisors as defined in the National Labor Relations Act, as amended.

And

All full-time and regular part-time, including per diem, licensed practical nurses (LPNs) and unit clerks/medical supply employees employed by the Employer at the Green Knoll Center, 875 Route 202/206 North, Bridgewater, New Jersey facility, as a residual to the existing unit currently represented by 1199 SEIU United Healthcare Workers East.

4. By unilaterally changing the unit employee premiums for single medical and dental coverage on about February 1, 2019, under the Respondent's health care plan, without providing notice and bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By unilaterally changing the unit employees' contributions for medical coverage on about July 1, 2020, under the Respondent's health care plan by reverting to those contribution amounts specified in the Respondent's January 14, 2019 initial terms and conditions of employment without providing notice and bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By unilaterally changing the unit employees' COVID bonus program on about June 7, 2020, by reducing the bonus amounts and the type of job classifications of unit employees who could receive the bonuses without providing notice and bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By unilaterally eliminating the unit employees' COVID bonus program on about July 1, 2020, without providing notice and bargaining with the Union to a lawful overall impasse in negotiations, the Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be required to make whole its employees for any earnings they suffered or expenses they incurred, including Social Security Administration (SSA) taxes, that resulted from Respondent's unlawful changes to and elimination of the bonus programs and any losses or expenses incurred when the Respondent unlawfully changed the health care premiums on about February 1, 2019, and on about July 1,

2020.[16] Any backpay amounts shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondent to compensate the affected unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB 1324 (2016). I would further recommend that the Respondent provide the Regional Director for Region 22, the affected employees' W-2 forms to address the possibility that the SSA may not accept Respondent's backpay reports without the accompanying W-2 forms to ensure that the allocation of backpay awards are accurately made to the appropriate calendar quarters. *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021).

Further, upon request of the union, to continue good-faith bargaining over the health care insurance and dental benefits.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[17]

The Respondent, Green Knoll Care, LLC d/b/a Complete Care at Green Knoll, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the health care insurance premiums of affected unit employees.
(b) Unilaterally changing and eliminating the bonus programs of affected unit employees.
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[16] As noted in the posthearing brief of the counsel for the Acting General Counsel, the free single coverage was restored as part of the settlement and as of January 31, 2020, the status quo for health and dental premiums was free single coverage, 25 percent for employee plus one and 30 percent for family coverage in regard to the unlawful change in the health care premiums on about February 1, 2019 (GC Br. at 5; GC Exh.1(i)). No finding of monetary relief is recommended to the extent that the unit employees were fully compensated in the settlement agreement for lost wages, benefits, and interests when their wages were deducted for the health care and dental premiums.

[17] If no exceptions are filed as provided by Sec. 102.46 and if no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request of the union, to continue good-faith bargaining over the health care insurance and dental benefits.

(b) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision for any backpay they suffered or expenses they incurred as a result of the unlawful action by Respondent in changing the amount of affected unit employees' contributions for medical coverage under the Respondent's health care plan on July 1, 2020, when it reverted to those contribution amounts specified in the Respondent's January 14, 2019 letter to the union. The health insurance status quo prior to July 1, 2020, was free single medical and dental coverage; 25 percent for employee plus one; and 30 percent for family coverage. The Respondent shall continue to provide such coverage for affected employees with that option until the parties reach a collective-bargaining agreement or overall impasse.

(c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision for any monetary amount they suffered as a result of the unlawful action by Respondent in unilaterally revising and reducing the affected employees' bonuses implemented on about May 2, 2020, without notice to and bargaining with the union over the modifications.

My recommend order would end the bonus program as of June 30, 2020. The bonus program was temporary in nature with a specific end date of June 30.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination, all payroll records, social security payment records, W-2 forms, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order incurred as a result of the unilateral implementation of the affected employees' premium contributions to the Respondent's healthcare insurance plan under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Complete Care at Green Knoll facility, Bridgewater, New Jersey, where unit employees work, copies of the attached notice marked "Appendix A."[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2019.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C August 2, 2021

Kenneth W. Chu
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefits and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to bargain collectively with the 1199 SEIU United Healthcare Workers East (Union) regarding wages, hours, and other working conditions of the employees in the following unit:

> All full-time and regular part-time, service and maintenance employees, including certified nursing assistants, activity assistants, dietary aides, restorative aides, cooks and Rehab Techs, employed by the Employer at its 875 Route 202/206 North, Bridgewater, New Jersey 08807 facility, excluding office clerical employees, receptionists, maintenance employees, professional employees, executive, managerial and confidential employees, casual or per diem employees who average less than sixteen (16) hours per week, registered nurses, temporary employees, casual on-call personnel, part-time employees who work a total of one-fifth (1/5th) of the regular full-time work week or less, guards, and supervisors as defined in the National Labor Relations Act, as amended.
>
> And
>
> All full-time and regular part-time, including per diem, licensed practical nurses (LPNs) and unit clerks/medical supply employees employed by the Employer at the Green Knoll Center, 875 Route 202/206 North, Bridgewater, New Jersey facility, as a residual to the existing unit currently represented by 1199 SEIU United Healthcare Workers East.

WE WILL NOT change your terms and conditions of employment without first notifying the1199 SEIU United Healthcare Workers East (Union) and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make you whole for any losses that you suffered or expenses you incurred as a result of the unlawful action taken against you, with interest.

WE WILL pay you for the wages and other benefits you lost, with interest, because we unilaterally deducted contributions from your pay for individual healthcare and dental coverage without bargaining with the Union.

WE WILL pay you for any portions of the monetary bonuses you did not receive because we unilaterally changed the bonus programs without bargaining with the Union.

WE WILL compensate affected unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award for your premium contributions to the Respondent's healthcare insurance plan.

WE WILL compensate you for the adverse tax consequences, if any, of receiving a lump-sum award for any monetary portions of bonuses not received by you.

WE WILL, upon request of the Union, rescind the unilaterally implemented changes to your contributions for individual health and dental care coverage that we made without bargaining with the Union.

Complete Care at Green Knoll, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
Hours of Operation: 8:30 a.m. to 5 p.m.
973-645-2100

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-244307 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0300.